



STATE OF INDIANA

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January 5, 2010

Mr. Grant Monahan
President, Indiana Retail Council
One North Capitol, Suite 430
Indianapolis, Indiana 46204

*Re: Formal Complaint 10-FC-4; Alleged Violation of the Access to
Public Records Act by the Office of Energy Development*

Dear Mr. Monahan:

This is in response to your formal complaint alleging the Office of Energy Development ("Office") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of the Office's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you submitted a written request in person for access to public records to the Office on November 9, 2009. Specifically, you requested a copy of "the State's plan for the Energy Efficient Appliance Rebate Program." The next day, you received a response to your request which noted that you would be given the information "in a reasonable amount of time." After four weeks passed and you received neither the records nor additional communication from the Office, you filed this complaint.

On behalf of the Office, S. Kyleen Nash responded to your complaint. Ms. Nash states that the Office responded to your November 9th request on November 10th in compliance with the APRA. Ms. Nash claims she spoke with you on the phone on November 10th, at which time you interpreted the APRA as requiring the Office to produce the records within twenty-four (24) hours. Ms. Nash, however, expressed that the APRA required the Office to merely respond within that timeframe and then produce the records within a reasonable amount of time. Finally, Ms. Nash states that after the records were approved by the federal government during the first week of December, the Office mailed them to you on December 8, 2009.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The Office is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Office’s public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). An agency may require a request to be made in writing or on a form provided by the agency. I.C. §5-14-3-3(a). If the request is delivered verbally or in person and the agency does not respond to the request within 24 hours of receipt, the request is deemed denied. I.C. §5-14-3-9(a). A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Office responded to your request in writing the day after you submitted your request. The Office’s response to you acknowledged receipt of your request and informed you that responsive records would be produced within a reasonable amount of time. Thus, it appears the Office responded to your request in a timely manner. I.C. § 5-14-3-9(a).

The APRA does not prescribe a timeframe during which a public agency must produce public records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the relevant facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

According to Ms. Nash, the records you requested were unavailable at the time of your request because they were not yet approved by the federal government. Once the records were approved, the Office sent the records to you within one week. If the records were not yet created or otherwise available, the Office could not have produced it to you. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). If the Office could not produce the records you requested until the first week of December, it is my

opinion that the Office did not violate the APRA by producing them to you on December 8th.

CONCLUSION

For the foregoing reasons, it is my opinion the Office did not violate the APRA by producing records to you on December 8th if the Office could not produce the records until the first week of December.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: S. Kyleen Nash